(2)

Supreme Court, U.S.
FILED
JUN 29 1995
CLERK

No. 94-1950

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SERENE G. SHAPER,
Petitioner,

v.

ROGER W. TRACY,
Tax Commissioner of Ohio,
and
BETTY D. MONTGOMERY,
Attorney General of Ohio,
Respondents.

On Petition for a Writ of Certiorari to the Ohio
Tenth Appellate District Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

BETTY D. MONTGOMERY
Ohio Attorney General

JEFFREY S. SUTTON
State Solicitor
LAWRENCE D. PRATT
Counsel of Record
ANDREW S. BERGMAN
Assistant Attorneys General
30 East Broad St., 17th Fl.
Columbus, Ohio 43215-3428
(614) 466-8980

COUNSEL FOR RESPONDENTS

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 3

I. The Decision Below Does Not Conflict With Any Lower-Court Decisions Or Any Decisions Of This Court. 3

II. The Commerce Clause Does Not Prohibit The State From Taxing Interest On Out-of-State Government Securities Differently From Interest On In-State Government Securities 6

CONCLUSION 12

TABLE OF AUTHORITIES

CASES — Page(s)

Bonaparte v. Tax Court, 104 U.S. 592 (1881) 3

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) 7

C & A Carbone, Inc. v. Clarkstown, ___ U.S. ___, 114 S. Ct. 1677 (1994) 8, 11

Carll v. S.C. Jobs-Economic Devel.Authority, 327 S.E. 2d 331 (S.C. 1985) 9

Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 7

Dominion National Bank v. Olsen, 771 F.2d 108 (6th Cir. 1985) 7, 8

Fidelity Guarantee Mortgage Corp. v. Conn. Hous. Finance Auth., 532 F. Supp. 81 (D.C. Conn. 1982) 9

Hughes v. Alexandria Scrap Corp, 426 U.S. 794 (1976) 9

National Private Truck Council, Inc. v. Oklahoma Tax Commission, No. 94-688, ___ U.S. ___, 1995 Lexis 4049 (June 19, 1995) 11

New Energy Company of Indiana v. Limbach, 486 U.S. 269 (1988) 10

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) . . . 7, 9, 10

Shaper v. Tracy, No. 92 CVH-11-9271, (Franklin Cty. C.P. November 12, 1993), *aff'd.*, 97 Ohio App. 3d 760 (1994), *app. den.* 71 Ohio St.3d 1477 (1995) 3, 7, 10

Shaper v. Tracy, No. 95-389 (Ohio Sup. Ct. filed February 17, 1995) 2

Shaper v, Tracy, No. 93-X-1032 (Ohio Bd. of Tax App., January 20, 1995), *appeal docketed*, No. 95-389 (Ohio Sup. Ct. Feb. 17, 1995) 1, 2

Shayne Bros. Inc. v. District of Columbia, 592 F. Supp. 1128 (D.C. D.C. 1984) 10

White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) 9, 10

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., art. I, §8, cl. 3 . . . . . *passim*

U.S. Const., art. IV, §1 3

Ohio Const., art. XII, §2 2

Ohio Const., art. VIII, §2b 2

Ohio Const., art. VIII, §2c 2

Ohio Const., art. VIII, §2f 2

Ohio Const., art. VIII, §2g 2

Ohio Const., art. VIII, §2i 2

Ohio Const., art. VIII, §2k 2

Ohio Const., art. VIII, §16 2

OTHER AUTHORITIES

Karen Pierog, *Ohio's Tax On Out-of-State Bond Spurs Suit That Worries Industry*, The Bond Buyer, Sept. 9, 1993 4

Thomas T. Vogel, Jr., *Ohio Suit Threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds*, Wall St. J., Dec. 14, 1993 1

STATEMENT OF THE CASE

Petitioner asks the Court to review a state court of appeals decision upholding the constitutionality of a subsidy provided by the State of Ohio for bonds issued by the state or its political subdivisions. The practice of subsidizing local public-works bonds, through a tax exemption for interest earned on those bonds, may well be as old as the history of issuing state and municipal bonds itself. All told, thirty-seven states have such subsidies, the oldest among them dating from the nineteenth century. Prior to this case, not one of these provisions had ever been challenged on Commerce Clause grounds -- much less challenged successfully. Both the trial court and the state court of appeals refused to invalidate this time-honored tradition, correctly concluding that the dormant Commerce Clause does not compel states to treat bonds that are issued to raise money within their state precisely the same as bonds that are issued to raise money outside of their state. Apparently agreeing with the courts below, the Ohio Supreme Court declined to review the case. This Court should do likewise.

For the most part, Respondents agree with Petitioner's Statement of the Case. A few particulars, however, merit elaboration. One, Petitioner neglects to mention, let alone discuss, a parallel state-court action still pending in the Ohio courts. Contemporaneous with this action, Petitioner filed an administrative refund request with the Ohio Department of Taxation for the years 1988 through 1991. That action, like this one, was premised on the alleged unconstitutionality of Ohio's subsidy for local bonds. The Ohio Tax Commissioner denied the claim on August 6, 1993 (Appendix B at 12a), after which the action was appealed to the Ohio Board of Tax Appeals. There, too, relief was denied, as the Board of Tax Appeals affirmed the administrative decision on January 20, 1995. *Shaper v.*

Tracy, No. 93-X-1032 (Ohio Bd. Tax App., January 20, 1995) (Appendix C at 6a). Petitioner then sought mandatory review of the Board's decision in the Ohio Supreme Court. The case is currently pending. *Shaper v. Tracy*, No. 95-389 (Ohio Sup. Ct. filed February 17, 1995) (Appendix A at 1a).[1]

Two, the alleged source of discrimination against interstate commerce is not solely a function of statute. The Ohio General Assembly is not entitled to tax interest earned on Ohio bonds under a provision of the state Constitution that was first adopted in 1905 and that has been readopted in various forms since then. *See* Ohio Const. art. XII, § 2, art. VIII, §§2b, 2c, 2f, 2g, 2i, 2k, 16. Three, the factual record is not entirely complete. Despite repeated attempts by the State, Petitioner has refused to disclose the nature of her out-of-state bond holdings. The record merely contains copies of Petitioner's Ohio income tax returns, which themselves disclose nothing more than the total amount of Petitioner's out-of-state bond income. The nature of the bonds, the state(s) from which they were issued, the precise manner in which the bonds are owned, even the bonds themselves, are not in the record. Notwithstanding repeated requests by the Ohio Tax Commissioner for this and other information, none has been forthcoming in this action or in the parallel administrative proceeding.

---

[1] Respondent Tax Commissioner has moved the state supreme court for an order either dismissing the second appeal or summarily affirming the decision of the Board of Tax Appeals under principles of *res judicata* and/or collateral estoppel. Petitioner has opposed the motion, and the court has yet to rule on it.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision Below Does Not Conflict With Any Lower-Court Decisions Or Any Decisions Of This Court.

As an initial matter, no lower-court conflict exists on this issue that would justify further review by the Court. Petitioner does not even suggest that such a conflict exists among the state courts. Indeed none does. In the more than one hundred years in which such legislation has existed, not one state court has found the scheme unconstitutional on Commerce Clause grounds or on any other ground.

Nor, for that matter, has this Court ever indicated that the widely-accepted practice is unconstitutional. On the contrary, the Court in reviewing a similar legislative scheme adopted by the state of Maryland noted that "[w]e know of no provision of the Constitution of the United States which prohibits such taxation." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).[2] Since then the Court has not altered this view by indicating that the Commerce Clause somehow limits a sovereign's authority to subsidize the raising of local capital in competition with its sister sovereigns. *See Shaper v. Tracy*, 97 Ohio App. 3d 760, 764-766 (1994), *app. den.*, 71 Ohio St. 3d 1477 (1995) (Petition, Appendix B at 6a-9a).

In the absence of any conflict concerning the validity of a statutory scheme in existence for more than a century, it is difficult to understand why the issue needs to be addressed now. Time will test the alleged merits of

---

[2] The precise challenge in the case arose under the "full faith and credit" clause of Article IV, Section 1 of the United States Constitution.

Petitioner's claim. After percolating among the lower courts, the issue either will ripen into a certworthy question or "die on the vine." In either event, sudden review of this latent question is not likely to help the Court.

Sudden review of the issue certainly would not help the states. At least 37 states have legitimately relied on their previously unchallenged authority to tax out-of-state government obligations differently from in-state government obligations. (Petition at 8-9 n.3). The significance of that reliance is difficult to overstate. Ohio's taxation of out-of-state bonds, for example, accounts for at least twenty million dollars ($20 million) in annual revenue. Affidavit of Michael P. Sobul, Assistant Administrator of the Tax Analysis and Local Government Distributions Division, Ohio Department of Taxation (Appendix D at 17a). Making in-state bonds tax exempt, of course, also facilitates the raising of revenue from the citizens whom it will benefit. Otherwise, without such an exemption

> ...some issuers, such as New York City, would see their cost of issuance "skyrocket" because the benefit of double tax exemption would be gone for buyers in the city, and those buyers could put their money in "safer paper."

Karen Pierog, *Ohio's Tax On Out-of-State Bonds Spurs Suit That Worries Industry*, The Bond Buyer, Sept. 9, 1993, at p. 1 (Petition Appendix H at 35a).

Investors also rely heavily on this statutory scheme, as Petitioner herself concedes. Given the wide currency of this type of legislation, Petitioner notes that "there are literally trillions of dollars invested in in-state municipal bond funds and single-state municipal bond funds." (Petition at 9

n.3) Nationwide, the 778 single-state bond funds by themselves represent a $132 billion market. Thomas T. Vogel, Jr., *Ohio Suit Threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds*, Wall St. J., Dec. 14, 1993, at C19 (Petition Appendix G at 31a-32a).

Petitioner's arguments for granting certiorari are not persuasive. The allegation that there is "major uncertainty" among the states over the issue (Petition at 10-11) is unsupported. As noted, there is no lower-court conflict on point. Indeed, even the entities that presumably suffer the most from the alleged Commerce Clause discrimination -- the sovereigns themselves -- have expressed no objection to these forms of subsidies. Nor does the adoption by five states of different bond schemes change things. As Petitioner concedes (Petition at 10 n.8), even these states engage in some form of subsidization of local public-works bonds. But just as importantly, for all that the record reveals, the decision by these states to tax interest on local public-works bonds is as apt to be driven by a desire to raise more revenue as by concerns about the Commerce Clause.

Unable to point to a single decision from any jurisdiction to support this alleged "major uncertainty" among the states, Petitioner is forced to rely exclusively on newspaper stories to support this point. The argument is unavailing. Not only is news coverage by itself an unusual ground for granting certiorari, but the news articles also fail on their own terms to advance Petitioner's argument. At best, they confirm that this lawsuit has application to other states, hardly a unique circumstance. At worst, they confirm the widespread reliance that Ohio and other states have placed on the validity of this longstanding practice. In the final analysis, Petitioner is simply wrong in suggesting that this is an appropriate time or an appropriate vehicle to review this issue.

II. The Commerce Clause Does Not Prohibit The States From Taxing Interest On Out-of-State Government Securities Differently From Interest On In-State Government Securities.

The courts below aptly rejected the Commerce Clause claim on the merits, further undermining Petitioner's request for review. The lower-court decisions are consistent with this Court's prior decisions in two important respects. First, the dormant or negative Commerce Clause does not limit the "commercial" actions of the sovereign itself, as opposed to actions designed to favor its citizens over citizens of another state. Second, Ohio's subsidy for in-state public-works securities fits well within the "market participation doctrine."

The key failing of Petitioner's argument on the merits is her assumption that state regulation of government participants in interstate commerce is subject to the same Commerce Clause scrutiny as state regulation of private participants in interstate commerce. That is wrong. As the state court of appeals correctly observed:

> A review of the case law developed by the United States Supreme Court demonstrates that the Commerce Clause has been directed at acts of a sovereign on behalf of its citizenry to improperly provide *its citizenry* with a competitive advantage over the *citizenry* of other states. The parties herein have provided this court with numerous Commerce Clause cases, whereby taxation schemes were challenged when a state's taxation scheme discriminated against out-of-state businesses or entities. None of the cases cited is directly on point. The instant action does not involve a

> taxation scheme whereby the citizenry of Ohio are provided with a competitive advantage over the citizenry of other states. Rather, the taxation scheme in the instant action benefits the state of Ohio itself. (citations omitted)(emphasis in original).

Shaper, 97 Ohio App.3d at 764 (Petition Appendix B at 6a-7a). *See Reeves, Inc. v. Stake*, 447 U.S. 429, 437 ("[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.").

Even the cases relied on by Petitioner make this point. For example, *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), cited at 13-14 of the Petition, involved an attempt by the State of New York to provide a competitive edge to private business, i.e., the New York Stock Exchange, by imposing a higher tax on securities transfers resulting from out-of-state sales than those resulting from in-state sales. Noting that "[t]he obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges," 429 U.S. at 331, the Court found the statute undermined the "basic purpose of the Commerce Clause. Permitting the individual States to enact laws that *favor local enterprises* at the *expense of out-of-state businesses* 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." 429 U.S. at 329 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)) (emphasis added).

Similarly, *Dominion National Bank v. Olsen*, 771 F.2d 108 (6th Cir. 1985)), cited by the Petitioner at 13-14 of the Petition, involved a state tax that provided a competitive advantage for local financial institutions. There, the state

taxed the earnings from certificates of deposit issued by out-of-state financial institutions, but did not tax earnings of certificates of deposit issued by Tennessee financial institutions. The Sixth Circuit invalidated this preference for in-state private businesses:

> The only relevant issue, whether the tax on interstate commerce be direct or indirect, is whether the tax *as a practical matter* creates a direct competitive advantage for local business by discriminating against interstate commerce.

Id. at 118 (emphasis in original).

Likewise, *C & A Carbone, Inc. v. Clarkstown*, ___ U.S. ___, 114 S. Ct. 1677 (1994), cited at page 18 of the Petition, is distinguishable on these grounds. The solid waste transfer station that was the object of the preferred treatment was operated by a *private contractor, Id.* at 1680, and the Court held that "state and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Id.* at 1684. In the end, the dormant Commerce Clause simply does not prevent states from subsidizing sales of their own bonds.

In arguing to the contrary, it is clear that Petitioner argues too much. If adopted, Petitioner's novel theory of Commerce Clause discrimination would seemingly have equal application to differential taxation of Ohio municipal bonds relative to private bonds. That cannot be. Nothing in the text or underlying function of the Commerce Clause indicates that governmental bodies are compelled to compete with private business on the same terms in fulfilling the traditional governmental function of funding public works.

At bottom, the very nature of local government, together with the inherent restrictions it (but not private business) faces in raising capital, make such a requirement improper as a matter of Commerce Clause jurisprudence and implausible as a matter of common sense.

For similar reasons, Petitioner errs in claiming that the "market participation doctrine" is inapplicable here. Under that doctrine, when the sovereign participates as a consumer or vendor in commerce, its proprietary actions as a market participant are exempt from Commerce Clause scrutiny. And that is so even though the sovereign's actions may provide economic advantages to some private businesses or individuals but not others. *See Hughes v. Alexandria Scrap Corp*, 426 U.S. 794 (1976); *Reeves, Inc., supra*; *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983).

In this instance, the issuance of state or municipal bonds are the acts of a market participant, not a market regulator. *Carll v. S.C. Jobs-Economic Devel. Authority*, 327 S.E. 2d 331, 337 (S.C. 1985) (state issuing bonds and making low interest loans to state businesses); *Fidelity Guarantee Mortgage Corp. v. Conn. Hous. Finance Auth.*, 532 F. Supp. 81 (D.C. Conn. 1982) (state issuing bonds to provide funds for housing loan purposes). Nor does a state's establishment of certain parameters on the conditions of those bonds, i.e., tax exempt status, in any way alter this conclusion. Petitioner was simply mistaken in suggesting below that the "market participation doctrine" does not apply merely because the state has utilized a tax measure as an incentive to market the bonds. But the fact that the state accomplishes by a tax measure what the Petitioner has already conceded it could accomplish by contract (agreeing, for example, to provide Ohio bondholders with a higher interest rate than non-Ohio bondholders) is immaterial under

Commerce Clause scrutiny. *See*, e.g., *Shayne Bros. Inc. v. District of Columbia*, 592 F. Supp. 1128, 1133-1134 (D. D.C. 1984) ("the fact that the District has accomplished by an ordinance what it might have done by contract . . . does not alter the essence of the act. The District is expending a public resource, as much so as the money in its treasury or the services of its police, firefighters and teachers....").

Petitioner also errs in claiming that *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988), is to the contrary. In *New Energy*, the Court merely rejected the argument that the enactment of a tax credit scheme, affecting *private* purchases and sales of ethanol, constituted the acts of a market participant. In *New Energy* the *only* participation of the sovereign in the affected market was the enactment of a tax measure. The state neither purchased nor sold ethanol, and thus was not a market participant. That plainly is not the situation here, where the government is the issuer and seller of the bonds.

This important distinction was correctly noted by the state trial court. *Shaper v. Tracy*, Case No. 92 CVH-11-9271 (Franklin Co. C.P. November 12, 1993), *aff'd.*, 97 Ohio App. 3d 760 (1994), *app. den.*, 71 Ohio St.3d 1477 (1995), slip op. at 11 (Petition Appendix D at 23a). Regardless of the form of the state action, the Commerce Clause was not designed to "limit the ability of the States themselves to operate freely in the free market." *Reeves, Inc.*, 447 U.S. at 437. Therefore the proper focus is not on form over substance, but on whether the legislative action is directed at impeding trade among private parties or whether it is directed at governing the state's own economic conduct. *White*, 460 U.S. at 218. If the goal is the latter, as the trial court correctly found, the measure is constitutionally sound.

"The central rationale" of the Commerce Clause "is to prohibit state or municipal laws. . . that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone*, 114 S.Ct. at 1682. At issue in this case is a state practice that has withstood the test of time (subsidy schemes like this one first appeared at least 100 years ago), that has been widely accepted (at least 36 other states have similar measures), that Congress has long stayed its hand in interfering with, and that has not led to the "jealousies and retaliatory measures" among the states that the clause was designed to prevent. Under these circumstances, the lower courts were correct in rejecting Petitioner's argument on the merits.[3]

---

[3] In light of the Court's recent decision in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, No. 94-688, ___ U.S. ___, 1995 U.S. Lexis 4049 (June 19, 1995), Petitioner is also incorrect in arguing that state courts are compelled to entertain section 1983 claims in state tax cases when the state (as here) already offers a remedy at law.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the Ohio Tenth Appellate District Court of Appeals should be denied.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

JEFFREY S. SUTTON
State Solicitor

LAWRENCE D. PRATT
Counsel of Record
ANDREW S. BERGMAN
Assistant Attorneys General
State Office Tower
30 East Broad St., 17th Fl.
Columbus, Ohio 43215-3428
(614) 466-8980

COUNSEL FOR RESPONDENTS

June 29, 1995

APPENDIX

TABLE OF CONTENTS

Page

A. Notice Of Appeal Of Appellant *Serene G. Shaper v. Roger W. Tracy, Tax Commissioner of Ohio*, Appellee, to the Supreme Court of Ohio, Case No. 95-389 filed February 17, 1995 . . . . . 1a

B. Ohio Board of Tax Appeals Decision and Order in *Serene G. Shaper vs. Roger W. Tracy, Tax Commissioner* of Ohio, Case No. 93-X-1032 dated January 20, 1995 . . . . . 6a

C. Ohio Tax Commissioner's Final Determination In re Refund Claim No. IT-6832, *Serene G. Shaper*, dated August 6, 1993 for Personal Income Tax Years 1988 through 1991 . . . . . 12a

D. Affidavit of Michael P. Sobul, Assistant Administrator of the Ohio Tax Analysis and Local Government Distributions Division, signed December 17, 1992 (attachments omitted) 17a

APPENDIX A

[Filed Feb. 17, 1995]

IN THE SUPREME COURT OF OHIO

No. 95-389

SERENE G. SHAPER,
Appellant,

v.

ROGER W. TRACY,
Tax Commissioner of Ohio,
Appellee.

Appeal from the Ohio Board of Tax Appeals
Case No. 93-X-1032

NOTICE OF APPEAL OF APPELLANT SERENE G. SHAPER

CLINTON A. KRISLOV
Counsel of Record
Krislov & Associates, Ltd.
222 North LaSalle Street
Suite 810
Chicago, Illinois 60601
(312) 606-0500
Fax No. (312) 606-0207

MOSES KRISLOV (0008137)
Moses Krislov Co., L.P.A.
Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 621-3532
Fax No. (216) 861-3916

LEON FRIEDBERG (0014260)
Benesch, Friedlander, Coplan
and Aronoff
88 East Broad Street
Columbus, Ohio 43215
(614) 223-9300
Fax No. (614) 223-9330

ATTORNEYS FOR APPELLANT

BETTY D. MONTGOMERY
Attorney General
and
LAWRENCE D.PRATT(0021870)
Assistant Attorney General
30 Broad Street, 16th Floor
State Office Tower
Columbus, Ohio 43215-3428
(614) 466-5967
Fax No. (614)466-8226

ATTORNEYS FOR APPELLEE
TAX COMMISSIONER

Notice of Appeal of Appellant Serene G. Shaper

Notice of Appeal. Appellant Serene G. Shaper hereby gives notice of her appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Board of Tax Appeals, journalized in case No. 93-X-1032 on January 20, 1995, affirming the tax Commissioner's denial of her refund claims for tax years 1988, 1990, 1991 and 1992. A true copy of the Decision and Order of the Board being appealed is attached hereto and incorporated herein by reference.

Errors in Decision Appealed From. The appellant complains that the Board of Tax Appeals erred in its Decision and Order by affirming the Commissioner's denial of Petitioner's Ohio income tax refund in which Petitioner: (1) asserted that Ohio income tax provision R.C. §5747.01(A)(1) on its face violates the Federal Constitution's Commerce Clause in discriminatorily taxing interest only on non-Ohio municipal bonds; and (2) sought relief for the class of all persons who similarly paid tax. The Board of Tax Appeals also erred in holding that the taxpayer had somehow failed to provide necessary documentation for her purely legal claim.

Related Appeal. The appellant has been concurrently pursuing a cause of action in the state courts for declaratory judgment on the same legal issues raised by this appeal but for subsequent tax years. That case is now before this Court on appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals (Case No. 94-2439). Because the issues in these two cases are identical, this Court should consolidate these appeals. Both appeals involve the facial constitutionality under the federal Commerce Clause of the Ohio income tax provision, R.C. §5747.01(A)(1), which taxes the interest on obligations issued by non-Ohio

governmental entities while exempting any interest received on obligations issued by Ohio governmental issuers.

In each case the Defendant Tax Commissioner has defended in part, by asserting that relief can only be had in the other proceeding. Case No. 94-2439 is a discretionary appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals. This appeal from the Board of Tax Appeals, however, is an appeal of right. Therefore, this Court must reach and decide the merits of this appeal.

Need for Consolidation with Related Appeal. The substantive merits of appellant's claim are extraordinarily significant. The main issue concerns the legality of a provision which produces some $25 million in annual revenue to this state. Similar provisions exist in 37 other states. If this Court affirms this appeal on the sole basis that the Board of Tax Appeals did not err in declining class action and constitutional issues, then the substantive issues of extreme importance presented in this case may receive partial or inadequate judicial review. However, if these cases are consolidated, the legal issues presented by this case will be addressed in one hearing and briefing session, and without technical procedural limits and cross-purpose arguments that separate appeals will engender, and this case will get the full and expedient attention that it deserves. Accordingly, this appeal should be noted as related to case No. 94-2437, jurisdiction in that appeal should be granted, and this appeal should be consolidated with Petitioner's appeal in No. 94-2439.

Respectfully Submitted,

/S/ Clinton A. Krislov
Counsel of Record

CLINTON A. KRISLOV
KRISLOV & ASSOCIATES, LTD.
222 North LaSalle Street
Suite 810
Chicago, IL 60601-1086
(312) 606-0500

Proof of Service

I certify that a copy of this Notice of Appeal was sent by certified mail to counsel for appellee, Lawrence Pratt, Assistant Attorney General of Ohio, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, Ohio 43266-0410 on February 17, 1995.

/S/ Leon Friedberg
Leon Friedberg

COUNSEL FOR APPELLANT,
SERENE G. SHAPER

APPENDIX B

OHIO BOARD OF TAX APPEALS

JAN 20 1995

Serene G. Shaper,	)	
	)	
Appellant,	)	CASE NO. 93-X-1032
	)	
vs.	)	(PERSONAL INCOME
	)	TAX)
Roger W. Tracy,	)	
Tax Commissioner	)	
of Ohio,	)	
	)	DECISION AND
Appellee.	)	ORDER

APPEARANCES:

For the Appellant - Clinton A. Krislov
Krislov & Associates Ltd.
222 North LaSalle Street
Suite 810
Chicago, Illinois 60601-1086

and

Moses Krislov
Moses Krislov Co., L.P.A.
800 Standard Building
1360 Ontario Street
Cleveland, Ohio 44113

For the Appellee - Lee I. Fisher
Attorney General of Ohio

By: Lawrence D. Pratt
Assistant Attorney General
State Office Tower
30 East Broad Street
16th Floor
Columbus, Ohio 43266-0410

The Board of Tax Appeals considers this matter upon the appellant's September 7, 1993 Notice of Appeal. Appellant is appealing from an August 6, 1993 journal entry which denied appellant's class action refund claim. The claim related to personal income tax payments for tax years 1988, 1989, 1990 and 1991.

The appellant claims to be the owner of securities of a state or political subdivisions thereof, other than this state and its subdivisions and authorities, during the tax years in question, and claims payment of income tax on the interest earned on such securities, pursuant to R.C. 5747.01(A)(1). R.C. 5747.01(A)(1) includes as taxable income, interest generated by non-Ohio state and municipal securities. However, it exempts from taxable income, interest earned upon Ohio state and municipal securities. This differential treatment of income earned on such securities is at the heart of appellant's appeal.[1]

---

[1]Appellant cites as her authority *Chemical Waste Management, Inc. v. Hunt* (1992), 504 U.S. ___, 112 S.Ct. 2009, 119 L. Ed. 2d 121, and *New Energy Co. of Indiana v. Limbach* (1988), 486 U.S. 269, 108 S.Ct. 1803, 100 L. Ed. 2d 302, for the proposition that just as a state may not tax incoming toxic waste or ethanol either exclusively or more heavily than that produced domestically, it is identically unacceptable to tax incoming municipal bond income more heavily than that generated on Ohio bonds.

Appellant appeals with three specifications of error. First, appellant contends R.C. 5747.01(A)(1) violates the Commerce Clause of the United States Constitution. Secondly, appellant contends the Tax Commissioner erred in ruling that her claim could not be brought as a class action. Thirdly, the appellant asserts her failure to submit separate factual evidence documenting her bond income should not affect the disposition of the purely legal claims.

The appellee Tax Commissioner determined the Revised Code does not contain a mechanism for a class action income tax refund claim. The Commissioner wrote:

> "* * *
>
> "Identification of each member of the class 'similarly situated' to the applicant would be a near impossibility, and the confidentiality of each taxpayer's tax information required by R.C. 5747.18 would be jeopardized through the forced inclusion into a class action refund claim and potential representation by someone not selected by the individual taxpayer. * * *
>
> "* * *"
>
> (ST. 23)

The Commissioner also found the appellant failed to provide information substantiating her Commerce Clause claim.

We consider this cause and matter upon the appellant's notice of appeal, the stipulation of facts submitted jointly by the parties, the transcript certified to the board by the Tax Commissioner, and the written legal arguments and additional authority submitted by the parties.

The stipulation of facts and the notifications of additional authority relate to the somewhat complicated civil proceedings concerning the same issues now before this Board. The appellant is concurrently pursuing a cause of action in the state courts. Most recently, the Franklin County Court of Appeals, in *Shaper v. Tracy, Tax Commissioner* (Sept. 29, 1994), Franklin App. No. 94APE0132, unreported, affirmed summary judgment entered by the Common Pleas Court. In the trial court, Judge Stratton held that the Commerce Clause has not been applied to acts of a sovereign on behalf of itself[2] (as opposed to its citizenry), which provided the sovereign with a competitive advantage over another sovereign.[3]

The appellant appealed the Franklin County Court of Appeals decision to the Supreme Court of Ohio on November 16, 1994, and the appellee Commissioner cross-appealed on November 30, 1994. The case appears on the Ohio Supreme Court's docket as case number 94-2439. The case is currently pending a determination of jurisdiction, upon the

---

[2]J. Stratton noted Commerce Clause cases deal with a state involvement or protection of private enterprise that in some way favors a private entity within a state, over an out-of-state industry. Stratton wrote: "*** neither the Supreme court nor any case law examined has applied the Commerce Clause to actions between government entities. Each state has a legitimate interest in tapping a major source of tax revenue while adding an incentive for investors to purchase state bonds."

[3]In so finding, J. Stratton granted appellee Commissioner's Motion for Summary Judgment, and also found the following: the appellant may maintain an action in Common Pleas Court for declaratory relief, the appellant is not first required to exhaust her administrative remedies before seeking declaratory relief, and the appellant does not have the right to maintain a 42 U.S.C. sec. 1983 action in Ohio state courts.

allowance of a claimed appeal of right, or a discretionary appeal.

Returning to the appeal before us, the appellant has aptly noted this Board is an administrative board, lacking the jurisdiction to determine the facial constitutionality of a statute. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St. 3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, paragraph one of the syllabus.

In *Herrick, supra*, plaintiffs brought in Common Pleas Court, a class action on behalf of former state employees, seeking a declaratory judgment that two state tax statute amendments were unconstitutional. The Supreme Court held the Common Pleas Court did have jurisdiction to render a declaratory judgment, despite alternative administrative remedies provided by R.C. Title 57. The Court wrote:

> "* * * administrative proceedings in this case would be futile preludes to the assertion of plaintiffs' actual claim in a later appeal to the courts. Administrative proceedings could not provide or even consider the relief sought by these plaintiffs. * * *"

These observations are equally applicable in this case. As such, we defer ruling upon appellant's claim questioning the constitutional validity of R.C, 5747.01(A)(1), on the basis that this Board is without jurisdiction to make such a declaration.

We affirm the Tax Commissioner's finding that R.C. 5747.11 does not provide for class action refund claims. We

affirm the commissioner's finding that appellant has failed to provide any information substantiating her claim for refund for payment of tax upon income earned upon securities issued by states and subdivisions thereof, other than this state.

Therefore, it is the Decision of the Board of Tax Appeals that the journal entry of the Tax Commissioner should be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

/S/ Kiehner Johnson, Chairman
Kiehner Johnson, Chairman

APPENDIX C

STATE OF OHIO
DEPARTMENT OF TAXATION

AUG 06 1993

FINAL DETERMINATION

In re Refund Claim No. IT-6832

Serene G. Shaper
2630 South Green Road
University Heights, Ohio 44122-1536

Personal Income Tax
Tax Years: 1988, 1989, 1990 and 1991

This matter involves a claim under R.C. 5747.11 for refund of $6,001.86.

The applicant contends that she is seeking the subject refund claim as a member of a class consisting of herself and "all others similarly situated" and that she is challenging *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128 and its holding that "class refund claims are not allowable." The applicant further contends that pursuant to *Chemical Waste Management, Inc. v. Hunt* (1992), 504 U.S. __, 119 L. Ed. 2d 121, 112 S. Ct. ____, R.C. 5747.01(A)(1) violates the Commerce Clause because it does not subject to Ohio personal income taxation interest generated by Ohio bonds, but does subject to such taxation interest generated by non-Ohio bonds. The applicant's contentions are not well taken.

The applicant's attempt to file a class action refund claim for the alleged illegal or erroneous payment of Ohio income taxes is not allowed. The controlling statute in the Ohio Revised Code providing for the refund procedure, i.e., R.C. 5747.11, does not allow for a class action refund claim. Identification of each member of the class "similarly situated" to the applicant would be a near impossibility, and the confidentiality of each taxpayer's tax information required by R.C. 5747.18 would be jeopardized through the forced inclusion into a class action refund claim and potential representation by someone not selected by the individual taxpayer. In essence, along with concerns for the potential of an administrative quagmire and a breach of confidentiality, the Ohio Revised Code does not contain a mechanism for a class action income tax refund claim. The applicant's refund application can only be considered as an application for the individually named taxpayer.

Further, while the applicant stated that she is challenging *Herrick v. Kosydar*, *supra*, for the proposition that class refund claims are not allowable, the issue in that case was whether the county common pleas court had jurisdiction to issue a declaratory judgment when an administrative remedy was available. The Court held that the common pleas court did have such jurisdiction. The only comment the Court made regarding refund claims and class actions was that considering that the class action in that case consisted of 40,000 claimants seeking refund of income taxes paid on state pension or retirement allowances, "[a]dministrative remedies would require each of those claimants to file a separate refund application, a requirement which can hardly be considered an equally serviceable alternative to a single declaratory judgment action." *Id.* at 130, 131. While not the holding, this statement by the Court does offer support to the Department of Taxation's position that income tax refund claims must be made by the individual taxpayer.

The applicant's Commerce Clause contention is also without merit. *Chemical Waste Management, supra,* dealt with a hazardous waste disposal fee that was imposed by the State of Alabama on hazardous waste generated outside Alabama but brought into the state for disposal at a commercial facility. The Supreme Court held that the legislation enacting the fee violated the Commerce Clause because it discriminated against out-of-state commerce, i.e., the legislation imposed a fee on hazardous waste from outside Alabama but did not impose the same fee on similar hazardous waste created in Alabama. A glaring lack of factual similarity exists between *Chemical Waste Management* and the instant case. Further, in *Chemical Waste Management* the Commerce Clause was violated because of legislation that was economic protectionism in the guise of environmental regulation. Economic protectionism does not exist here.

The Supreme Court has long held that when an individual state participates as a consumer or vendor in commerce, it is a market participant and not a market regulator and its actions are therefore exempt from Commerce Clause analysis, even if its actions incidentally result in economic advantages to the state's private sector. See *Hughes v. Alexandria Scrap Corp.* (1976), 426 U.S. 794; *Reeves, Inc. v. Stake* (1980), 447 U.S. 429; *White v. Massachusetts Council of Construction Employers, Inc.* (1983), 460 U.S. 204; and *South-Central Timber Development, Inc. v. Wunnickl* (1984), 467 U.S. 82. As a bond issuer, the State of Ohio is a market participant. As such, it is within its right to provide, as do approximately thirty-six states and the District of Columbia, an exemption for its own bonds that is not available for other states' bonds. The propriety of this right has been supported by the Supreme Court in *White v. Massachusetts Council of Construction Employers, Inc., supra*:

> The line between regulation and market participation, for purposes of the Commerce Clause, should be drawn with reference to the constitutional values giving rise to the market participant exemption itself. As the Court recognized in *Reeves*, the most important of these is that historically the "Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace"; it was not designed "to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U.S., at 437, 100 S. Ct., at 2277. The Court also observed that the distinction between participation and regulation rests on core notions of state sovereignty, coupled with the traditional right of private traders to determine the identities of their bargaining partners free from governmental interference. *Id.*, at 438-439, 100 S.Ct., at 2279. The legitimacy of a claim to the market participant exemption thus should turn primarily on whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt, analogous to the accustomed right of merchants in the private sector, to govern the State's own economic conduct and to determine the parties with whom it will deal.
>
> *Id.* at 218.

Additionally, though additional information was requested three times from the applicant, she failed to provide any information substantiating her claim of a Commerce Clause violation by R.C. 5747.01(A)(1). Usually the party

challenging a statute must prove discrimination and economic protectionism. *Hughes v. Oklahoma* (1979), 441 U.S. 322. The applicant has merely claimed in her application that a Commerce Clause violation exists, but has refused to offer any substantive evidence of such. Indeed, the applicant has refused even to submit information that would allow the Department of Taxation to determine the source of income claimed by her to be non-Ohio income reported on line 25 and federal income reported on line 30 of the Ohio tax returns for each tax year at issue. Without the cooperation of the applicant and without her supporting her claims with substantive evidence, there is no alternative but to deny the refund claim.

Accordingly, the subject refund claim is denied.

THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THE SUBJECT MATTER. UPON EXPIRATION OF THE THIRTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

I HEREBY CERTIFY THE FOREGOING
TO BE A TRUE AND CORRECT COPY OF
THE ACTION OF THE TAX COMMISSIONER
TAKEN THIS DAY WITH RESPECT TO THE
ABOVE MATTER.

/S/ ROGER W. TRACY

Roger W. Tracy
Tax Commissioner

/S/ Roger W. Tracy

ROGER W. TRACY
TAX COMMISSIONER

APPENDIX D

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Case No. 92CVH-11-9271
Judge Stratton

SERENE G. SHAPER,
Plaintiff,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Defendant.

AFFIDAVIT

STATE OF OHIO)
): SS
COUNTY OF FRANKLIN)

I, Michael P. Sobul, being duly sworn, state that the following is true to the best of my knowledge and belief.

The Tax Analysis and Local Government Distributions Division (formerly the Research and Statistics Division) of the Ohio Department of Taxation houses the library and historical documents of the department. I am the Assistant Administrator of that division and have made the attached copies of the following documents stored there as official records:

1. A copy of the cover and first four pages of the Ohio Tax Study Commission Report 1967 to the 107th General Assembly.

2. An abstract from the Legislative Service Commission dated April 30, 1970, of the testimony by Dr. Frederick Stocker on March 17, 1970 to the House Ways and Means Committee.

3. A Memorandum dated December 16, 1992 from Dr. Frederick Stocker concerning his testimony in item 2.

In my capacity as Assistant Administrator, I also have access to and am responsible for working with the department's records of annual revenue derived and/or outstanding from state income tax. Accessing these records, I have determined that approximately twenty million dollars ($20,000,000.00) was derived and/or is outstanding from non-Ohio governmental obligation interest and dividends reported on Ohio income tax returns for year 1989.

Further, affiant sayeth naught.

/S/ Michael P. Sobul

Sworn to and subscribed in my presence this 17th day of December, 1992.

/S/ Lawrence D. Pratt
Notary Public

LAWRENCE DWIGHT PRATT,
Attorney-At-Law
NOTARY--STATE OF OHIO
My commission has no
expiration date.
Section 147.03 R.C.